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No. 09-1492

Supreme Court, U.S.
FILED
AUG 27 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

STATE OF MISSOURI,
Petitioner,

v.

ROBERT R. BROOKS,
Respondent.

On Petition for a Writ of Certiorari
To the Supreme Court of Missouri

REPLY BRIEF

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PETITIONER'S REPLY

Mr. Brooks takes issue with the State's characterization of the case, accusing the State of misrepresenting "the record and the basis for the Missouri Supreme Court's holding." Opp.Br. 12. Mr. Brooks observes that the prosecutor, at trial, repeatedly stated or argued, and suggested through questioning, that Mr. Brooks had said "Not a word" during his post-*Miranda* interrogation, or, alternatively, that Mr. Brooks (in his post-*Miranda* statement) had failed to mention certain facts that he later testified to at trial. Opp.Br. at 7-10, 13-15. Thus, Mr. Brooks argues that the State was not using his post-*Miranda* statement against him, but, rather, that the State was using his post-*Miranda* silence against him. Opp.Br. 14-15.

I. Mr. Brooks's argument regarding the form of the prosecutor's statements and questions ignores the legal meaning of "silence" under *Doyle*, and it merely urges the Court to adopt a "formalistic" meaning of silence that the Court refused to adopt in *Anderson v. Charles*.

In arguing that the prosecutor's comments and questions did not refer to a post-*Miranda* statement that "concerned the shooting" (Opp.Br. 14), and that the prosecutor instead sought to prove Mr. Brooks's guilt by arguing that Mr. Brooks was silent "across the board" (*see* Opp.Br. 12), Mr. Brooks ignores the context of the prosecutor's comments and questions.

It is true that, in the State's opening statement, the prosecutor said that the evidence would show

that Mr. Brooks said "Not a word" to the officers who questioned him about the murder of his fiancée. App. A6. But, contrary to Mr. Brooks's assertions, the prosecutor did not thereby suggest to the jury that Mr. Brooks was silent "across the board" after the *Miranda* warnings. Rather, the prosecutor also pointed out that Mr. Brooks "said, I need to talk to somebody . . . or I need a phone book." App. A6. And, in fact, while the prosecutor did not at that time detail all of the evasive and nonresponsive answers that Mr. Brooks offered, the prosecutor indicated that the questioning went on for "close to an hour or so." App. A6-A7. Accordingly, it was apparent from the context of the prosecutor's opening statement that, when the prosecutor said that Mr. Brooks had said "Not a word," the prosecutor was merely highlighting the fact that Mr. Brooks had not provided any specific details about the murder. The prosecutor was not trying to suggest that Mr. Brooks remained silent "across the board." Indeed, because Mr. Brooks's entire post-*Miranda* statement was played for the jury (App. A33), this was plainly not a case where the State sought to portray the defendant as silent "across the board" and, thus, guilty.

Of course, had Mr. Brooks actually elected to remain silent, such comments by the prosecutor would have been improper. But because Mr. Brooks made a post-*Miranda* statement (albeit a largely vague, evasive, and non-responsive statement), it was proper for the prosecutor to present the contents of that statement and to highlight Mr. Brooks's failure to provide important details that one would reasonably expect a person to divulge when talking to the police. Mr. Brooks argues that in *Doyle* and *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the Court "roundly rejected" the argument that a person

would "naturally" be expected to divulge the fact that they acted in self-defense. Opp.Br. 19. But Mr. Brooks misunderstands the petitioner's argument. The petitioner's argument is premised on the condition that, when a person elects to talk to the police (and does not elect to remain silent), one would naturally expect that person to claim self-defense if, in fact, a shooting was done in self-defense. In *Doyle*, the defendant elected to remain silent post-*Miranda*, and, in *Abrahamson*, likewise, the defendant elected to remain silent post-*Miranda*. Here, by contrast, Mr. Brooks did not elect to remain silent. To the contrary, Mr. Brooks said that he had "nothing to hide" about the murder; and, accordingly, one would expect Mr. Brooks to be forthcoming in speaking to the police.[1]

Mr. Brooks asserts that the petitioner "has taken liberties with the record to create the impression that Mr. Brooks provided a detailed post-*Miranda* account of the shooting when he clearly did not." Opp.Br. 13. He avers that "The petitioner repeatedly asserts that Mr. Brooks made a lengthy statement about his role in the shooting after being advised of his *Miranda* rights." Opp.Br. 13. But this is plainly incorrect, as the petition made plain that Mr. Brooks did *not* give a detailed account of his role in the murder. Even the question presented plainly stated

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[1] Mr. Brooks faults the petitioner for stating that *Brecht* "did not involve post-*Miranda* silence." Opp.Br. 19. But, in fact, the petition, in referring to a part of *Brecht*, stated that *Brecht* "involved pre-*Miranda* silence." Pet. 18. This was correct, as the part of *Brecht* cited in the petition involved a discussion about pre-*Miranda* silence. *Brecht* also examined evidence of some post-*Miranda* silence that the Court concluded "crossed the *Doyle* line," but the type of evidence discussed there is not at issue here.

that during a lengthy post-*Miranda* interrogation, Mr. Brooks "gave nonresponsive, evasive, and generic exculpatory answers." Pet. *i*. The question further stated that Mr. Brooks had *not* provided "a self-defense account or other important details." Pet. *i*. At other points, the petition reiterated that Mr. Brooks gave nonresponsive, evasive and generic responses, and that Mr. Brooks "told the police nothing of value during the post-*Miranda* interrogation." Pet. 2-3, 8, 11, 13. And, of course, the Appendix to the petition contained a full recitation of Mr. Brooks's post-*Miranda* statement (in which he repeatedly answered questions about the events surrounding the murder by offering nonresponsive and evasive answers). Thus, Mr. Brooks's accusation that the petitioner has taken liberties with the record is not well taken.

In fact, in attempting to make his accusation stronger, Mr. Brooks quotes a part of the petition out of context. Specifically, he asserts that the petition stated that Mr. Brooks "offered 'statements about his role in the murder.' " Opp.Br. 13. What the petition actually stated was that "Mr. Brooks talked at length with the police officers and made various *incomplete and misleading statements* about his role in the murder." Pet. 13 (emphasis added). At no point did the petition suggest that Mr. Brooks actually divulged any details of his conduct; rather, the petition made plain that Mr. Brooks's post-*Miranda* statements were designed to hide his conduct.

It appears that Mr. Brooks is taking issue with the petitioner's view that Mr. Brooks's various answers were made "in reference" or "in relation" or "about" or "in connection with" the murder. But this objection by Mr. Brooks reveals not that the

petitioner has taken "liberties" with the record, but that Mr. Brooks merely disagrees with the petitioner's view of the record. But, while it is understandable that Mr. Brooks would want to maintain that he made no statements "in reference" to the murder, the simple fact is that he did. The police were expressly questioning Mr. Brooks about the murder when Mr. Brooks sought to divert them with his nonresponsive, evasive, and generic claims of innocence and ignorance. *See* App. A33-A47. Thus, when he stated that he had "nothing to hide," Mr. Brooks was not talking about some unknown event or abstract concept—Mr. Brooks was stating that he had "nothing to hide" about the murder.[2]

Mr. Brooks also takes issue with the petition's assertion that "the fact of [Mr. Brooks's] invocation [of his right to remain silent] was not presented to the jury." Opp.Br. 15 (citing Pet. 17). Mr. Brooks points out that the prosecutor, in opening statement, *did* refer to Mr. Brooks's invocation. Opp.Br. 15 (citing Tr. 162-163). But Mr. Brooks is comparing the petition's discussion of what parts of Mr. Brooks's recorded statement were played for the jury with what was said in opening statement.

The petition was correct in pointing out that the portion of the videotape that contained Mr. Brooks's invocation was not played for the jury. *See* App. A47. And, as far as opening statement is concerned, the petition pointed out in a footnote that "the State was not permitted to comment on Mr. Brooks's

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[2] The Missouri Court of Appeals agreed that Mr. Brooks had made a statement about the murder. App. A24 ("The defendant's statement clearly refers to the alleged criminal offense.").

invocation." Pet. 9. This footnote was a reference to the fact that, during the State's opening statement, defense counsel objected to the prosecutor commenting on Mr. Brooks's invocation, and the trial court sustained that objection and instructed the jury to disregard. *See* App. A25 (in a footnote, the Court of Appeals discussed the curative steps taken by the trial court in opening statement). In short, the petition was correct in noting that the State was not permitted to comment on Mr. Brooks's invocation and in stating that the recorded invocation itself was not presented to the jury.

Ultimately, all of Mr. Brooks's attempts to recast the case and accuse the petitioner of misstating the record grow out of Mr. Brooks's contention that he was "silent" about the facts of the murder and, thus, that the State should not have been allowed to use this alleged "silence" against him. He asserts that the Court in *Doyle* has already decided this issue in his favor, and he points out that in *Doyle*, the defendant made a few generic statements at the time of his arrest. But this fact was acknowledged by the petition, and for the reasons set forth in the petition, petitioner believes that *Doyle* did not answer the question presented here.

Mr. Brooks also avers that the Missouri Supreme Court merely properly applied the rule of *Anderson v. Charles*, because "the prosecutor here construed Mr. Brooks' post-*Miranda* statements as non-substantive silence and asked the jury 'to draw meaning from silence.' " Opp.Br. 17. But the prosecutor did not try to draw meaning from post-*Miranda* silence; rather, the prosecutor sought to draw meaning from the incompleteness of Mr. Brooks's post-*Miranda* statement. It is true that this

means that the prosecutor was pointing out omissions (or, in a sense, "silence" within the statement) and drawing meaning from those omissions, but *Anderson v. Charles* expressly stated that such "silence" was not protected, post-*Miranda* silence as contemplated by *Doyle*. *See Anderson v. Charles*, 447 U.S. 404, 409 (1980) ("*Doyle* does not require any such formalistic understanding of 'silence[.]' ").

Mr. Brooks argues that "The fundamental flaw in Missouri's argument is that the prosecutor never sought to impeach Mr. Brooks with alleged contradictions between his trial testimony and post-*Miranda* statements." Opp.Br. 18. He points out that in questioning some of the State's witnesses, the prosecutor did not ask "about anything Mr. Brooks said during the interview," and that, "Instead, the prosecutor concentrated on Mr. Brooks post-*Miranda* silence by inquiring into an array of things Mr. Brooks did not tell the detectives." Opp.Br. 18. But this argument is flawed in at least four respects.

First, although it did serve to impeach Mr. Brooks's later testimony, the primary purpose in questioning the State's witnesses was not to "impeach Mr. Brooks." Rather, it was to show that Mr. Brooks gave another false and incomplete statement once he arrived at the police station. (As outlined in the petition, Mr. Brooks gave several false statements in the immediate aftermath of the murder. Pet. 16-17.) Second, contrary to Mr. Brooks's assertion, the prosecutor did ask about the contents of Mr. Brooks's post-*Miranda* statement, and the entire statement (except for Mr. Brooks's eventual invocation of his rights) was played for the jury. Third, the prosecutor did impeach Mr. Brooks after

Mr. Brooks took the stand and offered his new story that he had acted in self-defense. And, finally, at no point did the prosecutor rely on post-*Miranda* silence to prove guilt or impeach Mr. Brooks's trial testimony. Mr. Brooks insists on referring to the incompleteness of his statement (or his omissions) as "silence," but this formalistic view of silence was rejected in *Anderson v. Charles*.

Mr. Brooks's formalistic view of silence is the basis for his contention that the Missouri Supreme Court's decision is not in conflict with the various conflicting cases cited in the petition. Opp.Br. 21-26. He argues:

> In most of the cases, the defendant told the police a detailed post-*Miranda* exculpatory story and contradicted that story in his or her trial testimony. ... Because Mr. Brooks did not talk about the shooting during his post-*Miranda* interview and the prosecution asked the jury to draw meaning from Mr. Brooks's silence, these cases are inapposite.

Opp.Br. 21-22. But it is Mr. Brooks's formalistic view of silence that leads him to conclude that the prosecutor was commenting on silence. Similarly, Mr. Brooks's focus on the factual differences between the types of post-*Miranda* statements made in the various cases misses the point. If, after receiving the *Miranda* warnings, a defendant makes any type of statement about the crime—generic or detailed—the government should be allowed to use that statement (and any omissions) against the defendant. Indeed, that is precisely what the *Miranda* warnings tell people—that any statements they make can be used against them.

Mr. Brooks avers that the petitioner has "sought to distance itself from its trial strategy on appeal," by asserting "for the first time that Mr. Brooks actually made post-*Miranda* statements about the shooting which waived his *Doyle* claims." Opp.Br. 19. He thus argues that the doctrine of judicial estoppel "bars Missouri from asserting this position on appeal as it is diametrically opposed to the one it urged at trial." But this is incorrect, as the State argued at trial, and on appeal in the Missouri Court of Appeals and the Missouri Supreme Court, that because Mr. Brooks did not remain silent after receiving the *Miranda* warnings, his post-*Miranda* statements (including his selective "silence" about the specifics of his involvement in the murder) could be used against him. Tr. 165-166, 536-548. Moreover, this issue was decided on its merits by the Missouri Supreme Court, and the petitioner is presenting the same arguments here that were presented there.[3]

In sum, the Court should reject the Missouri Supreme Court's view that an evasive and incomplete post-*Miranda* statement is "silence" as that term is contemplated under *Doyle*.

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[3] The only arguments that were not preserved are Mr. Brooks's. He made no objection to most of the alleged *Doyle* violations, and he stated that he had "No objection" to the admission of his post-*Miranda* statement. App. A10-A13, A25-A27. The lack of additional argument in the trial record regarding the State's view on the admissibility of this evidence is directly related to the fact that Mr. Brooks did not object.

II. The Missouri Supreme Court's opinion runs contrary to the recent decision in *Berghuis v. Thompkins*.

Recently, the Court ruled that a defendant, who "was '[l]argely' silent during the interrogation, which lasted about three hours," had not invoked his right to remain silent during that lengthy period of persistent silence. *Berghuis v. Thompkins*, 130 S.Ct. 2250, 2256-57, 59-60 (2010). The Court rejected the defendant's claim that he had invoked his right to remain silent, and the Court held that an invocation of the right to remain silent must be "unambiguous." *Id.* at 2260.

In analyzing the issue, the Court pointed out that "There is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously." *Id.* The Court observed that "A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that 'avoid[s] difficulties of proof and ... provide[s] guidance to officers' on how to proceed in the face of ambiguity." *Id.* The Court then pointed out that "If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression 'if they guess wrong.' " *Id.* "Treating an ambiguous or equivocal act, omission, or statement as an invocation of *Miranda* rights 'might add marginally to *Miranda*'s goal of dispelling the compulsion inherent in custodial interrogation[, b]ut as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney are sufficient

to dispel whatever coercion is inherent in the interrogation process." *Id.*

Here, while this case is not premised upon an alleged *Miranda* violation, many of the same concerns discussed in *Berghuis* are implicated. Indeed, although Mr. Brooks made numerous post-*Miranda* statements (and was not silent at all for a lengthy period of time), the Missouri Supreme Court held that Mr. Brooks's ambiguous, evasive, and equivocal statements—along with his omissions—were the equivalent of post-*Miranda* silence. Thus, the Missouri Supreme Court held that the State should not have been allowed to use Mr. Brooks's "non-substantive" statements against him.

But this is contrary to *Berghuis*, which recognized that "silence" for purposes of *Miranda* must be something other than an "ambiguous act, omission, or statement." And inasmuch as *Doyle* is designed to protect post-*Miranda* silence, it makes little sense to extend *Doyle*'s protective shield to evasive and equivocal statements (and omissions).

As discussed previously in the petition (Pet. 25-27), and as observed by the Court in *Berghuis*, "If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression 'if they guess wrong.' " Here, similarly, police, prosecutors and trial courts will be forced to make more "difficult decisions" when faced with ambiguous, nonresponsive, evasive, or incomplete statements. But a bright-line rule—which states that any post-*Miranda* statements can be used against the defendant—would eliminate such decisions. In

short, the Court should grant the petition so that the Court's *Doyle* cases can be clarified and made consistent with *Berghuis*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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